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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

Thomas A. Dillon, Independent Fiduciary  
of Employers Mutual Plans,

Plaintiff,

v.

James Lee Graf, et al.

Defendants.

**CASE NO. CV-N-03-0119-HDM-VPC**

**PRELIMINARY REPORT**

PROPOSED PRELIMINARY REPORT

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1 Plaintiff Thomas A. Dillon, as the Court Appointed Independent Fiduciary of the  
2 Employers Mutual Plans submits this Preliminary Report pursuant to the Court Order of March  
3 26, 2003. A Proposed Preliminary Report was mailed to all defendants requesting input for  
4 this document. The responses received from defendants are incorporated herein.

5 I.

6 **PRELIMINARY UNDERSTANDING OF FACTS**

7 (i) PLAINTIFF'S FACTUAL CONTENTIONS

8 Thousands of employers throughout the United States established individual Employee  
9 Welfare Benefit Plans ("EWBPs") for their respective employees by establishing or maintaining  
10 programs for the purpose of providing medical, surgical, prescription drug and hospital care  
11 benefits to their employees and the dependents of their employees (hereinafter "Participants").  
12 Plaintiff Thomas A. Dillon has been appointed the Independent Fiduciary of these EWBPs  
13 (sometimes hereinafter referred to as the "Employers Mutual Plans" or the "EWBPs") because,  
14 in part, the medical insurance they paid for turned out to be fraudulent and claims payable  
15 pursuant to the individual plans remain unpaid.

16 The Employers Mutual Plans were created by the employers when they agreed to purchase  
17 or participate in the purchase of health insurance for the benefit of the Participants. To  
18 accomplish this task, the EWBPs attempted to purchase health insurance offered for sale by  
19 the RICO defendants identified in the complaint and described as being led by defendant  
20 James Graf ("GRAF"). Instead of purchasing real health insurance as represented by the RICO  
21 defendants, the Employers Mutual Plans had their premiums stolen or embezzled by the RICO  
22 Defendants pursuant to the plan of the RICO enterprise.

23 The RICO defendants defrauded the Employers Mutual Plans by falsely representing to  
24 them that in exchange for premiums, paid on a monthly basis to the RICO defendants from  
25 January 2001 through to the end of January 2002, the Employers Mutual Plans would be  
26 purchasing health insurance for their corresponding Participants issued by various licensed  
27 insurers. However, no licensed insurers agreed to provide health insurance to the Participants  
28 of the Employers Mutual Plans as promised by the RICO defendants, which resulted in the

1 Participants incurring approximately \$50,000,000 in health care and prescription drug claims  
2 payable pursuant to the promised policies which remain unpaid. The alleged health insurance  
3 was sold to the Employers Mutual Plans by approximately 400 Insurance Producers, who have  
4 been sued herein for malpractice, breach of contract to procure valid insurance and breach  
5 of their warranty of authority as agents of the alleged admitted carriers.

6 Plaintiff contends that the 400 defendant Insurance Producers committed malpractice and  
7 breached their respective contracts to provide valid insurance by, among other things: (i)  
8 failing to confirm that the licensed insurers had, in fact, granted the RICO defendants the  
9 authority to bind coverage; (ii) failing to confirm that the licensed insurers had, in fact, agreed  
10 to insure the Employers Mutual Plans; and (iii) failing to investigate the legitimacy of the  
11 facade of health insurance offered for sale by the RICO defendants.

12 (ii) DEFENDANTS FACTUAL CONTENTIONS

13 (i) The defendant Insurance Producers deny the existence of facts to support  
14 the assertion of Jurisdiction by the United States Federal Courts.

15 (ii) Additionally, the defendant Insurance Producers deny the existence of  
16 facts to allow the U.S. District Court, for the District of Nevada, Reno,  
17 to serve as an appropriate venue.

18 II.

19 **PLAINTIFF'S VIEW OF CRITICAL FACTUAL AND LEGAL ISSUES**

20 (i) SUMMARY OF CRITICAL FACTUAL AND LEGAL ISSUES FROM PLAINTIFF'S  
21 PERSPECTIVE

22 By operation of law, Dillon has standing to prosecute the Insurance Producers of the  
23 EWBP's for state law breaches of contract, professional negligence and breach of warranty of  
24 authority. ERISA does not regulate or govern Dillon's state law causes of action against the  
25 defendant Insurance Producers.

26 Discovery has revealed that some defendant Insurance Producers sold the alleged  
27 insurance to EWBP's and, at the same time, sold it to individuals with no employer/employee  
28 relationship. As to those "individuals" Dillon proposes filing an Amendment to the Complaint

1 alleging class allegations whereby he would represent the individuals as a Rule 23 class action  
2 representative along with his Court Ordered representation of the EWBP.

3 Discovery has also revealed that the computer data received from the RICO defendants and  
4 wholesalers of the alleged insurance is incomplete whereby the clients are not always linked  
5 to the Insurance Producer who sold them the defective insurance. Therefore, effort needs to  
6 be expended by Plaintiff and cooperation needs to come from the defendant Insurance  
7 Producers whereby evidence is produced from each defendant Insurance Producers identifying  
8 their employer clients and the participants of each EWBP, as well as any individuals they sold  
9 the alleged insurance to.

10 Plaintiff proposes a four (4) step process to perfect the data. First, the defendant Insurance  
11 Producers that have not already responded to the Court Ordered Interrogatories must do so  
12 by October 1, 2003. Second, Plaintiff will incorporate that information into the database and  
13 produce a Preliminary Unpaid Claims Report for each defendant Insurance Producer  
14 identifying their clients and the amount of unpaid claims attributable to their failure to procure  
15 the insurance as promised. Third, each of the defendant Insurance Producers will then be  
16 obligated to correct the information contained in their respective Preliminary Unpaid Claims  
17 Reports, if necessary. Finally, Plaintiff will issue a Final Unpaid Claims Report as to each  
18 defendant for use at trial.

19 E&O coverage for some of the defendant Insurance Producers has become an issue. Some  
20 E&O carriers are taking the position that the Insolvency Exclusion and the Unauthorized  
21 Insurance Exclusion preclude coverage. Plaintiff and defendants take the position that these  
22 two exclusions do not apply because the admitted carriers that the Insurance Producers were  
23 lead to believe were the risk bearing entities (Golden Rule, Sun Life Insurance Company of  
24 Canada, and United Wisconsin Life Insurance Company), are not insolvent and they are all  
25 authorized insurers. No defendant Insurance Producer believed that Employers Mutual, LLC,  
26 was the "insurer" or "risk bearing entity." The defendant Insurance Producers believed that  
27 the RICO Defendants had procured the insurance from the A- rated insurers as represented.  
28 The fact that defendant Graf paid some claims at the inception of the scam is evidence of a

1 Ponzi scheme and not evidence that Employers Mutual, LLC, was, or became, an  
2 "unauthorized insurer" that is now "insolvent."

3 Given the position taken by some E&O carriers, Plaintiff intends to settle with certain  
4 defendants for Stipulated Judgements equivalent to the amount of unpaid claims (plus costs  
5 of estate administration) or to obtain default judgements against those agents who are unable  
6 to mount a defense without participation by their respective E&O carriers. Plaintiff then  
7 intends to sue the E&O carriers to collect on the Judgements.

8 In order to perfect the proposed litigation against the E&O carriers, the plaintiff requests  
9 the court to schedule a Damage Prove-Up Hearing the day before the start of the trial in this  
10 matter. At the Damage Prove-Up Hearing, Plaintiff will establish the damages attributable to  
11 those Insurance Producers who's E&O carriers have abandoned them in this action, so that  
12 Judgements in the appropriate amount may be entered for prosecution of the subsequent  
13 action against the E&O carriers.

14  
15 (ii) DILLON HAS STANDING AS THE INDEPENDENT FIDUCIARY OF THE EWBP's  
16

17 On December 12, 2001, Elaine Chao, the Secretary of the United States Department of Labor,  
18 filed a complaint in the United District Court for the District of Nevada against, among others,  
19 James Graf for ERISA violations in the matter entitled Chao v. Graf, et al., Case No. CV-N-01-  
20 0698-DWH-RAM (hereinafter referred to as the "ERISA Proceeding").

21 On December 13, 2001, in the ERISA Proceeding, the United States District Court  
22 appointed Thomas A. Dillon as the Independent Fiduciary of the Employers Mutual Plans with  
23 the authority "to pursue all legitimate claims . . . the Employers Mutual Plans may have against  
24 third parties which, in his judgment, are likely to result in a meaningful recovery of assets to  
25 pay participant claims or the costs of administration."

26 The Employers Mutual Plans are the thousands of individual Employee Welfare Benefit  
27 Plans ("EWBP's) created by individual employers for the purpose of providing medical,  
28 surgical and hospital care benefits to their respective employees and beneficiaries (hereinafter

1 referred to as "Participants").

2 On February 1, 2002, in the ERISA Proceeding, the United States District Court ordered  
3 that Plaintiff Thomas A. Dillon "shall continue to serve as the Court's Independent Fiduciary  
4 of the Employers Mutual Plans with plenary authority to administer said entities" and that  
5 Thomas A. Dillon "shall collect, marshal, and administer the assets of . . . the Employers  
6 Mutual Plans including those sums owing and payable to them, process the Employers Mutual  
7 Plans' un-adjudicated claims and pay those which are found to be legitimate, identify all  
8 creditors of the entities and the amount of their claims, and take such further actions with  
9 respect to said entities which may be appropriate. The Independent Fiduciary shall exercise  
10 full authority and control with respect to the management or disposition of the assets of the  
11 Employers Mutual Plans . . . [T]he Independent Fiduciary is authorized to pursue all legitimate  
12 claims . . . the Employers Mutual Plans may have against defendants or third parties which,  
13 in his judgment, are likely to result in a meaningful recovery of assets to pay participant claims  
14 or costs of administration. The Independent Fiduciary's authority includes the authority to  
15 seek relief in this Court under the All Writs Act, 28 U.S.C. §1651 [and] to obtain quasi-  
16 bankruptcy protection for the Employers Mutual Plans if appropriate."

17 On April 30, 2002, in the ERISA Proceeding, the United States District Court, exercising  
18 its equitable jurisdiction over the Employers Mutual Plans, their respective participants and  
19 beneficiaries, as well as over the creditors of the EWBP's, entered an Order Establishing a  
20 Quasi-Bankruptcy for the thousands of Employers Mutual Plans. The Court imposed a quasi-  
21 bankruptcy proceeding for the equitable dissolution of the EWBP's and their assets, which is  
22 an equitable bankruptcy remedy to ensure that the equitable policies underlying ERISA are  
23 satisfied. See Cuttler v. The 65 Security Plan, 831 F. Supp. 1008, 1022-23 (E.D.N.Y. 1993);  
24 All Writs Act, 28. U.S.C. §1651; and SEC v. Gould, 622 F.2d 1363 (1980).

25 In the Order Establishing the Quasi-Bankruptcy, the United States District Court created the  
26 following categories of creditors of the Employers Mutual Plans (hereinafter collectively  
27 referred to as "Creditors"):  
28

- 1           A.       The Independent Fiduciary, his attorneys, actuaries, accountants,  
2                   consultants and other professional service providers retained by the  
3                   Independent Fiduciary who have incurred or will incur fees or wages on  
4                   or after December 13, 2001 ("Administrative Creditors");
- 5           B.       The Participants and beneficiaries of the EWBP's who have paid out-of-  
6                   pocket for medical and health claims, other than co-payments and  
7                   deductibles, that should have been paid by the alleged insurance  
8                   purchased by the Employers Mutual Plans ("Category A Creditors");
- 9           C.       The medical and health providers of the participants of the Employers  
10                  Mutual Plans ("Category B Creditors");
- 11          D.       All other service providers of the Employers Mutual Plans ("Category C  
12                  Creditors"); and
- 13          E.       Any other remaining obligations of the Employers Mutual Plans  
14                  ("Category D Creditors").

15       In the Order Establishing the Quasi-Bankruptcy, the United States District Court  
16       reconfirmed the powers granted the Independent Fiduciary in the Court's Order filed on  
17       February 1, 2002 and reiterated that the Independent Fiduciary had "the power and duty to  
18       take any and all actions necessary and proper to fully effectuate" the Court's Order, including,  
19       without limitation, "the responsibilities to initiate, defend and settle litigation" on behalf of the  
20       EWBP's.

21       In the Order Establishing the Quasi-Bankruptcy, the United States District Court ordered  
22       that assets of the Employers Mutual Plans recovered by the Independent Fiduciary through  
23       litigation against third parties shall be distributed and the priority of payment to Creditors shall  
24       be as follows:

- 25           A.       Administrative Creditors shall have first priority and shall be paid 100  
26                   percent of their claims;
- 27           B.       Category A Creditors shall have second priority and, as funds permit  
28                   after payment of the Administrative Creditors, shall be paid 100 percent

of their claims;

C. Category B and Category C Creditors shall receive pro rata distribution of the funds remaining after payment of the Administrative and Category A Creditor claims; and

D. Category D Creditors shall receive pro rata distribution of the funds remaining after payment of the Administrative and Category A, B, and C Creditor claims.

Pursuant to the Order Establishing the Quasi-Bankruptcy, the United States District Court ordered that after the final pro rata distribution was made, the Court shall then issue a permanent injunction barring any adverse actions against the Employers Mutual Plans and their Participants by any and all Creditors for claims associated with defective health coverage purchased by the Employers Mutual Plans which they were not authorized to sell and for their respective Participants, and otherwise discharging those claims.

On March 3, 2003, this lawsuit was filed by the Independent Fiduciary against approximately 400 defendants alleging, among other things, that the defendant Insurance Producers (i) breached their contracts to procure insurance, (ii) committed malpractice and (iii) breached their warranty of authority as agents when they sold defective health insurance to the Employers Mutual Plans which was marketed fraudulently by defendant James Graf and several other named co-conspirators.

(iii) DILLON'S LAWSUIT AGAINST THE DEFENDANT INSURANCE PRODUCERS IS BASED UPON STATE LAW, NOT ERISA

A. ERISA does not pre-empt state law malpractice actions against professionals who provide services to the EWBP.

Independent Insurance Producers are generally considered to be the agents of the insured. Boulton v. Phoenix Worldwide Industries, Inc., 698 So. 2d 1248 (Fla. 3d DCA 1997). Congress did not intend ERISA preemption to extend to state law tort claims brought against the insurance agent who sold insurance to the EWBP. Morstein v. National Insurance Services, Inc., 93 F.3d 715 (11<sup>th</sup> Cir. 1996).

1 When a state law claim brought against a non-ERISA entity does not affect relations among  
2 principal ERISA entities, then the claim is not pre-empted by ERISA. As a corollary, actions  
3 that affect the relations between plan entities, on the one hand, and an outside party, on the  
4 other hand, similarly escape preemption. Airports Company, Inc. v. Custom Benefit Services  
5 of Austin, Inc., 28 F. 3d 1062, 1065 (10<sup>th</sup> Cir. 1994). The insurance producer is not an ERISA  
6 entity. ERISA entities are the employer, the plan fiduciaries, and beneficiaries under the plan.  
7 Morstein, at 722-723.

8 In the case at bar, the ERISA entities (the employer, the plan, the plan fiduciaries, and the  
9 beneficiaries) are all united with Dillon in his efforts to secure redress from the incompetent  
10 Insurance Producers. As stated by the 10<sup>th</sup> Circuit:

11 "A recovery from defendants will increase the coffers of the plan; a  
12 defeat will mean that the plan has expended money in fruitless  
13 litigation. Such a tangential effect, however, is not enough to relate  
14 these state law claims to the plan itself." Airports, at 28 F. 3d 1066.

15 The third circuit in Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price  
16 Waterhouse, 879 F. 2d 1146, 1153 (3<sup>rd</sup> Cir. 1989) observed:

17 "We feel that professional malpractice actions brought by a plan are  
18 directly analogous to the situation in Mackey [Mackey v. Lanier  
19 Collection Agency & Serv., Inc., 486 U.S. 825, 833 (1988)], and  
20 that, in the absence of an explicit corresponding provision in ERISA  
21 allowing a professional malpractice cause of action, Congress did  
22 not intend to preempt a whole panoply of state law in this area." *Id.*,  
23 at 1153.

24 Other Federal Court cases holding that malpractice actions against Insurance Producers  
25 who sold insurance to EWBP's are not preempted by ERISA include: Giannetti v. Mahoney,  
26 218 F.Supp.2d 8, (2002), and; Wilson v. Zoellner, 114 F.3d 713 (8<sup>th</sup> Cir. 1997).

1           B.           Dillon's State Law Based Causes of Action are for Breach of Contract,  
2                           Malpractice and Breach of Warranty of Authority.

3                           (1)       Breach of Contract to Procure Insurance

4           On the Breach of Contract claim, Dillon has the burden of proving by the preponderance  
5 of the evidence all of the facts necessary to establish:

- 6                           (a)       The existence of a contract;  
7                           (b)       The clients' performance on the contract;  
8                           (c)       The Insurance Producer defendants' failure to perform;  
9                                       and,  
10                          (d)       Damages caused to the client by the breach.

11          A contract to procure insurance is created between an Insurance Producer and its clients  
12 when the clients agree to purchase the insurance offered by the agent. Eddy v. Sharp, 199 Cal.  
13 App. 3d 858 (1988). An Insurance Producer breaches his contract with the insured if he fails  
14 to obtain the insurance coverage requested by the insured which the Insurance Producer  
15 agreed to procure for the insured. Eddy, supra.

16          The clients of the defendant Insurance Producers were the EWBP's who were seeking to  
17 purchase health insurance as a benefit of employment for their respective employees and the  
18 individuals seeking coverage. The clients request to the defendant Insurance Producers for  
19 health insurance coverage was an invitation to the defendant Insurance Producers to make an  
20 offer by submitting a proposal for coverage. No contract comes into existence between the  
21 Insurance Producer and the client until the client accepts the offer of the Insurance Producer  
22 to procure the requested coverage. An agreement to accept a policy as represented is  
23 sufficient consideration. Duncanson v. Service First, Inc., 157 So. 2d 696 (Fla. 3d DCA  
24 (1963); O.R. Michell Motors, Inc. v. Joe Morrota & Sons, Inc., 358 S.W. 2d 741 (Tex. Civ.  
25 App. 1962).

26          The Insurance Producer is liable for breach of contract to procure insurance if at the time  
27 the contract to procure the insurance was entered into, the Insurance Producer had no actual  
28 or apparent authority to bind the insurer. The Insurance Producer must respond to damages

1 to the extent of the loss which would have been recoverable under the terms of the proposed  
2 policy. Duncanson, at 699.

3 In the case at bar, the EWBP's (and other individuals) requested the defendant Insurance  
4 Producers to procure health coverage for their employees and themselves. The defendant  
5 Insurance Producers offered to obtain health insurance issued by Golden Rule (and the other  
6 admitted carriers) and the clients accepted the offer. At such time, a binding contract was  
7 formed obligating the defendant Insurance Producers to obtain the coverage from Golden Rule  
8 (or the other admitted carriers) as outlined in their proposal. Plaintiff contends that the  
9 defendant Insurance Producers breached the contract because they were not authorized to  
10 bind Golden Rule or the other admitted carriers and could not obtain the coverage as  
11 promised. Duncanson, at 699.

12 (2) Insurance Producer Negligence

13 On the Claim for Insurance Producer Malpractice, Dillon must prove:

- 14 (a) The defendant Insurance Producers performed services for  
15 their clients;
- 16 (b) The defendant Insurance Producers had a duty to perform  
17 the services in a reasonably prudent manner with the care  
18 and skill ordinarily used in like cases by reputable  
19 members of the same industry practicing in the same  
20 locality under similar circumstances;
- 21 (c) Damages to the clients by the defendant Insurance  
22 Producers' failure to use such care and skill.

23 State and Federal courts regularly have found that insurance agents can be held to  
24 professional standards of conduct. See, e.g., Moore v. Kluthe and Lane Insurance Agency,  
25 Inc., 89 S.D. 419, 234 N.W.2d 260 (S.D. 1975)(an agent who holds himself out as being  
26 qualified to procure insurance is required to exercise the particular skills reasonably to be  
27 expected of one in that occupation); Fiorentino v. Travelers Insurance Company, 448 F. Supp.  
28 1364 (E.D. Penn. 1978) (the duty owed by an insurance agent to an insured is to obtain the

coverage that a reasonable and prudent professional agent would have obtained under the circumstances).

In Florida, the courts described Insurance Producers as advisors, law interpreters, and the provider of the “best package” of insurance for their clients. Pierce v. AALL Insurance, Inc., 513 So.2d 160, 161 (1981). The courts however, refuse to recognize insurance agents as professionals for statute of limitations purposes under its bright-line test. Pierce v. AALL Insurance, Inc., 530 So. 2d 84, 87-88 (Fla. 1988). Insurance Producers remain liable for ordinary negligence when the improper rendering of the Insurance Producers services causes damage to their client, the insured. Bitz v. Ed Knox CLU & Associates, P.A., 721 So.2d 823 (Fla.3rd DCA 1998).

In Nevada and Texas, once an agreement to procure insurance has been reached the insurance agent is obliged to use reasonable diligence to place the insurance and seasonably to notify the client if he is unable to do so. Keddie v. Beneficial Insurance, Inc., 94 Nev. 418, 580 P.2d 955 (1978); Jack Criswell Lincoln Mercury, Inc. v. Tsiachlis, 549 S.W.2d 255 (1977).

Whether the conduct of the defendant Insurance Producers in the case at bar is measured by standards of ordinary care or a heightened standard set for professionals, the conduct fell below what was required. As alleged in the complaint, the defendant Insurance Producers failed to confirm that Golden Rule (or the other admitted carriers) agreed to bind coverage, they failed to confirm that James Graf was authorized by to bind coverage, they failed to investigate Employers Mutual LLC, and defendant Graf's sixteen (16) Nevada Associations, and they failed to obtain health insurance from the admitted carriers as they had promised.

(3) Breach of Warranty of Authority

A cause of action for breach of warranty may be alleged against an agent who purports to make a contract on behalf of a principal, and represents that he has the power to do so. In McKnight v. Hialeah Race Course, Inc., 242 So.2d 478 (Fla.3d DCA 1970), the court quoted the provision set forth in Restatement (Second) of Agency § 329 that such a representation by an agent becomes a warranty:

“A person who purports to make a contract, conveyance or representation on behalf of

1 another who has a full capacity but whom he has no power to bind, thereby becomes  
2 subject to liability to the other party thereto upon an implied warranty of authority,  
3 unless he has manifested that he does not make such warranty or the other party knows  
4 that the agent is not so authorized." McKnight, at 480.

5 This action for breach of warranty of implied authority was first adopted by the Florida  
6 Supreme Court in Tedder v. Riffin, 65 Fla. 153, 61 So. 244 (1913). The Supreme Court said:  
7 "An agent, purporting to act for and bind a principle whom he has no authority to  
8 represent, is liable for breach of implied warranty or in tort to the extent of any damages  
9 resulting to the other party from such misrepresentation of authority." Groeltz v.  
10 Armstrong, 125 Iowa, 39, 99 N.W. 128 (1904).

11 The law is the same in other jurisdictions. An agent who acts without authority to bind his  
12 purported principal is himself liable. Thomas, Richardson, Runden & Co. v. State, 683 S.W.2d  
13 100 (1984); Yoakum v. Tarver, 256 Cal.App.2d 202, 64 Cal.Rptr. 7 (1967).

14 On the claim for Breach of Warranty of Authority against the defendant Insurance  
15 Producers, Dillon must prove:

- 16 (a) That the defendant Insurance Producers represented to  
17 their clients that they were authorized to sell insurance  
18 issued by Golden Rule or the other admitted carriers;
- 19 (b) That the clients relied upon the representation;
- 20 (c) That the defendant Insurance Producers were not  
21 authorized by Golden Rule or other admitted carriers to  
22 sell the insurance; and,
- 23 (d) Damages to the clients legally caused by the breach.

24 (iv) DILLON NEEDS DISCOVERY FROM THE DEFENDANT INSURANCE  
25 PRODUCERS TO PROPERLY ALLOCATE THE DAMAGES SUFFERED

26 Dillon has accumulated computer data from various sources, including the wholesalers of  
27 the defective product, Associated Agents of America, Inc. (hereinafter referred to as "AAA"),  
28 and American Benefit Society, Inc. (hereinafter "ABS"). The data from AAA is fairly complete

1 as it identifies each Insurance Producer who sold the defective insurance to each client as well  
2 as the commission sharing arrangement between the retail Insurance Producer and all up-line  
3 Insurance Producers in the string of commerce up to AAA. Dillon has been unable to recover  
4 the ABS data in electronic form and the ABS data is not complete.

5 From the AAA data, the Plaintiff can run reports on each Insurance Producer under AAA  
6 which identifies the client as well as the employees of each client. The social security  
7 numbers of each Participant are then used to link the unpaid claims of the Participant first to  
8 the employer, then to the retail Insurance Producer and ultimately to each intermediary  
9 Insurance Producer involved in a given transaction.

10 Once Dillon obtains the complete data (in electronic form or otherwise) on the down-line  
11 Insurance Producers of ABS, he believes he will be able to run the same reports he can run  
12 on the AAA down-line agents. Accordingly, the development of this information is critical to  
13 the presentation of Dillon's case at trial and Dillon needs coordinated discovery on this issue.

14 Plaintiff suggests a four (4) step process to perfect the computer data for the Retail  
15 Insurance Producers of both Wholesalers, AAA and ABS. First, the defendant Insurance  
16 Producers must all respond to the Court Ordered Interrogatories by October 1, 2003.

17 Second, the information provided in response to the Court Ordered Interrogatories will be  
18 used by Plaintiff to generate a Preliminary Unpaid Claims Report for each defendant Insurance  
19 Producer. The Preliminary Unpaid Claims Report will detail client claims information for each  
20 defendant Insurance Producer. Each defendant Insurance Producer will be provided their  
21 respective Report by November 1, 2003. In conjunction with the Preliminary Unpaid Claims  
22 Report, Plaintiff will also serve on each defendant Insurance Producer a Request for  
23 Admissions and a Special Interrogatory. The Request for Admissions will request each  
24 defendant Insurance Producer to admit or deny the accuracy of the information contained in  
25 the Preliminary Unpaid Claims Report.

26 Third, the defendant Insurance Producers are to respond to the Request for Admissions and  
27 Special Interrogatory relating to the accuracy of the Preliminary Unpaid Claims Report. If the  
28 Response to the Request for Admissions is not one of an unequivocal admission to the

1 accuracy of the Report, the defendant Insurance Producer is to answer the Special  
2 Interrogatory by setting forth, in detail, the facts which support the denial.

3 Fourth, the Plaintiff will incorporate the information received via the Response to the  
4 Request for Admissions and the Response to the Special Interrogatory, and generate a Final  
5 Unpaid Claims Report. This will be provided to each defendant Insurance Producer by  
6 February 14, 2004, for use in settlement discussions and at trial.

7 Court control over this process will insure that the damage reports are accurate, timely, and  
8 admissible at trial.

9 (v) AN AMENDMENT TO THE COMPLAINT CONTAINING A RULE 23 CLASS  
10 ALLEGATION IS REQUIRED TO EFFECTUATE THE INTENT OF THE COURT'S  
11 ORIGINAL ORDER APPOINTING DILLON AS INDEPENDENT FIDUCIARY OF  
12 THE EWBP's

13 In Chao v. Graf et al., Judge Hagan entered Orders appointing Dillon as the Independent  
14 Fiduciary of the thousands of EWBP's, staying all litigation by Providers against Participants,  
15 creating an orderly plan of dissolution of the EWBP's, and preventing Providers from pursuing  
16 Participants after Dillon collected funds from litigation and paid the Providers a pro-rata  
17 amount owed on their unpaid bills. The scope and spirit of the Orders were intended to  
18 protect all persons who purchased the alleged insurance.

19 At the inception of the case, Dillon was informed that the alleged insurance was sold to  
20 employers for the benefit of their employees, and thus ERISA was triggered and the transaction  
21 involved the creation of EWBP's. This belief was based, in part, on the fact that the solicitation  
22 materials utilized by the defendant Insurance Producers proclaimed that the procurement of  
23 insurance was employment related and governed by ERISA. Discovery has revealed that this  
24 was not always the case.

25 In the case at bar, the vast majority of the transactions involved the solicitation of  
26 employers to purchase insurance for their employees. Discovery has revealed that in some  
27 isolated instances the alleged health insurance was sold by defendant Insurance Producers to  
28 both EWBP's and, in addition, to individuals with no employer/employee relationship. Because

1 the purchase of health insurance by an individual (non-employee) does not trigger ERISA  
2 jurisdiction, these individuals may not technically be represented by Dillon as the  
3 Independent Fiduciary of the EWBP's.

4 To effectuate the spirit of the Orders issued by the Court to resolve the harm done to all  
5 persons who purchased the alleged insurance, an Amendment to the Complaint should be  
6 filed that contains Rule 23 class allegations. Plaintiff proposes that he represent the  
7 "individuals" as a Rule 23 class action representative along with his Court ordered  
8 representation of the EWBP's. Plaintiff's counsel is in the process of preparing the Amendment  
9 to the Complaint, and will seek the courts approval for filing same.

10 Dillon's proposed role as class representative of the "individuals" is proper under Court  
11 interpretation of Rule 23 typicality requirements. Typicality requirements are broadly  
12 construed and provide that a trustee is a viable class representative provided his interests are  
13 in concert with those of the class. Markewich v. Adikes, 76 F.R.D. 68 (E.D.N.Y. 1977).  
14 Further, "[U]nder the rule's permissive standards, representative claims are 'typical' if they are  
15 reasonably co-extensive with those of absent class members; they need not be substantially  
16 identical." Hanlon v. Chrysler Corp., 150 F.3d 1012, 1020 (9<sup>th</sup> Cir. 1998). "[T]ypicality refers  
17 to the nature of the claim or defense of the class representative, and not to the specific facts  
18 from which it arose or the relief sought." Jones v. Shalala, 64 F.3d 510, 514 (9<sup>th</sup> Cir. 1995).

19 Dillon, as Independent Fiduciary, has been assigned all causes of action held by the  
20 EWBP's. In order for Dillon to properly serve as a class representative for a Rule 23 class that  
21 includes the individuals, the claims he holds on behalf of the EWBP's must be 'typical' of those  
22 held by the individuals.

23 In the case at bar both the individuals and the EWBP's sought health coverage. Both the  
24 individuals and the EWBP's were presented with solicitation materials, entered contracts and  
25 paid premiums to procure the alleged insurance. The causes of action against the defendant  
26 Insurance Producers for both the EWBP's and the individuals arise from the same set of facts  
27 surrounding the solicitation regarding the alleged insurance and failure to procure the alleged  
28 insurance by the defendant Insurance Producers. The damages caused to both groups are the

1 same: unpaid health benefits. The remedy sought for both groups is identical: payment of  
2 unpaid claims. Accordingly, the claims and interests asserted by the individuals, on the one  
3 hand, and Dillon on behalf of the EWPBs, on the other, are factually and legally  
4 indistinguishable.

5 Plaintiff Dillon's claims as the representative of the EWPBs are "typical" of those of the  
6 individuals and he may properly serve as a representative of the individuals pursuant to FRCP  
7 23.

8  
9 (vi) A PROVE-UP HEARING ON THE EVE OF TRIAL IS NECESSARY TO PERFECT  
10 FORTHCOMING LITIGATION AGAINST E&O CARRIERS THAT DENY  
11 COVERAGE TO DEFENDANT INSURANCE PRODUCERS

12 Some defendant Insurance Producers' E&O carriers are denying coverage which leaves the  
13 defendant Insurance Producers unable to financially defend themselves. Plaintiff intends to  
14 seek Default Judgements as to these defendant Insurance Producers or, alternatively, to settle  
15 with them for Stipulated Judgements. In either circumstance the Judgement sought would  
16 reflect the amount of their unpaid claims (plus the costs of estate administration). Plaintiff then  
17 intends to sue the E&O carriers to collect on these Judgements.

18 Plaintiff requests the Court to schedule a Damage Prove-Up Hearing the day before the  
19 trial date in this matter. At the Hearing, Plaintiff will establish the damages attributable to  
20 those defendant Insurance Producers who have defaulted or agreed to the entry of Stipulated  
21 Judgments. Judgements need to be entered in order to perfect the proposed litigation against  
22 these E&O carriers who have abandoned their insureds.

23 **III.**

24 **DEFENDANTS' VIEW OF CRITICAL FACTUAL AND LEGAL ISSUES**

- 25 (i) The defendant Insurance Producers deny the existence of facts to support  
26 the assertion of Jurisdiction by the United States Federal Courts.  
27 (ii) Additionally, the defendant Insurance Producers deny the existence of  
28 facts to allow the U.S. District Court, for the District of Nevada, Reno,

1 to serve as an appropriate venue.

2  
3 IV.

4 **LIST OF AFFILIATED COMPANIES AND COUNSEL**

5 Attached hereto as Exhibit "1", is the list of Defendants remaining in the case who have  
6 been served with the Complaint or who Plaintiff intends to serve in the near future. The list  
7 of Defendants includes their respective E&O Insurance Carriers and counsel, if any.

8 V.

9 **RELATED CASES**

10 As noted both in this document and in the papers already on file with this court, on  
11 December 12, 2001, Elaine Chao, Secretary of the United States Department of Labor filed an  
12 action entitled Chao v. Graf, et al., Case No. CV-N-01-0698-DWH-RAM. The action is  
13 substantially similar to the instant case and is pending before The Hon. David W. Hagen, of  
14 the United States District Court, Reno, Nevada.

15  
16 DATED: July 30, 2003

HOLLISTER & BRACE

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18 By: 

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**EXHIBIT 1**

**DEFENDANT RETAIL INSURANCE PRODUCERS, E&O CARRIERS AND COUNSEL AS**  
**APPLICABLE**

**EXHIBIT 1**

# Agent/Attorney List

Agent No	Defendant Name	Agents Attorneys
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## PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action. My business address is 1126 Santa Barbara Street, Santa Barbara, California 93101.

On July 30, 2003, I served the foregoing documents described as the following:

1. **PROPOSED PRELIMINARY REPORT**
2. **CASE MANAGEMENT ORDER**

on the interested parties in this action by placing

☐ the original ☒ a true copy thereof enclosed in sealed envelopes to the addresses on Page 2 attached hereto.

I caused such envelope to be deposited in the mail at Santa Barbara, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with Hollister & Brace's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on July 30, 2003, at Santa Barbara, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

  
SHELLEY J. CHORLTON

DILLON v. GRAF, et al.  
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